ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION IV

CA 06-290

MARCH 14, 2007

BILL LOYD and YVONNE LOYD APPELLANTS	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [NO. CV 03-6850]
V.	HONORABLE MARION HUMPHREY, JUDGE
MAJID KAMELI and RITA KAMELI APPELLEES	AFFIRMED

This appeal is from a judgment for the tenants of a building for the value of equipment that they replaced during the lease. On appeal, the landlords argue that the trial court's decision is clearly erroneous because the tenants were in breach of the lease. We disagree and affirm the trial court's award.

Appellants Bill Loyd and Yvonne Loyd leased some real and personal property in Pulaski County to appellees Majid Kameli and Rita Kameli,[1] who operated the I-40

[1]Appellees individually signed the lease, then assigned it to I-40 Restaurant, Inc.; after its termination, it was assigned back to appellees.

Restaurant, from August 17, 1998, to August 17, 2003. This lease provided that appellees would maintain the building in good repair:

> LESSEE agrees to keep in good order, condition and repair, the roof, foundations and structural portions of the leased premises (except glass and glass windows, including other decorative portions of the store front) including any damages thereof caused by any act or negligence of the LESSEE, its employees, agents, licensees or contractors. The . . . LESSORS shall not be responsible to make any other improvements or repairs of any kind upon the leased premises (the same in no manner referring to the matter of fire or other insured risks or damages to the demised premises which are dealt with separately in this lease).

The lease set forth the parties' rights at termination as follows:

> LESSORS agree that, provided LESSEE is not in default under this lease, LESSEE may remove from the leased premises upon the termination of this lease all of its partitions, soft floor coverings, signs, shelving, wall cases, and other trade fixtures, fixtures and equipment without let or hindrance by LESSORS, but LESSEE shall repair any damage to the premises resulting from such removal.

In January 2003, Mr. Loyd sent a letter asking appellees to make certain repairs, which he listed as follows:

1. Repair roof
2. Repair ceiling in the back
3. Repair all signs
4. Repair damaged metal on west side (where cars have ran [sic] into it)
5. Repair ice bins, replace door
6. Replace all missing equipment
7. Replace cover over cooler unit on roof
8. Replace cover over unit over walk in cooler
9. Repair and replace door to bathrooms

In June 2003, appellants sued appellees in the Pulaski County Circuit Court, asserting that appellees had failed to respond to their demand that appellees make the repairs, which would cost between $15,000 and $20,000. Appellants requested that appellees be ordered

to make the repairs or that appellants have judgment for their cost, lost rent while the repairs were being made, attorney's fees, and costs.

Appellees filed a counterclaim in February 2004, alleging that some of the equipment that they had leased from appellants was in such poor condition that it was necessary for appellees to spend over $25,000 replacing it; that appellees were the rightful owners of that equipment; and that, upon termination of the lease, appellants had prevented appellees from removing the new equipment from the premises, thereby breaching the lease and converting the equipment. In the alternative, appellees asked for replevin of the equipment and for damages for the value of its use. After the lease ended, appellants took possession of the property and operated a restaurant there. In September 2004, the equipment was destroyed in a fire at the premises. Appellants received insurance proceeds that included the value of the equipment.

The case was tried by bench trial on November 21, 2005, at which both sides orally amended their claims to request the amount of insurance proceeds paid for the equipment. Mr. Loyd testified that he had made some repairs to the property after he retook possession of it; that he did not believe that appellees were entitled to any of the insurance proceeds; that, with the help of the police, he prevented appellees from removing some equipment from the premises on August 16, 2003; that he did not recall Mr. Kameli ever asking him to repair any equipment; and that he considered Mr. Kameli to be in default.

Mr. Kameli testified that, by the second month of the lease, the equipment began to fail and that Mr. Loyd refused to accept any responsibility for the repairs. Mr. Kameli said that, during the lease, appellees replaced the egg grill, the ice maker (which, before he replaced it, seriously inflated the water bill), the oven, the freezer compressor, a hot-water heater, a sixty-inch range with a two-foot griddle and six burners, and a thirty-six-inch griddle, which were valued at $11,355. He said that, on the day the lease ended, Mr. Loyd called the police when appellees attempted to remove the equipment that they had purchased. Mr. Kameli said that, although the lease (which appellants prepared) obligated appellees to make repairs to equipment that was not working properly, it did not require them to replace equipment that was beyond repair. He admitted receiving the January 2003 letter from Mr. Loyd, and stated: "I didn't do these things to the property. I didn't damage – I didn't cause these."

At the conclusion of the trial, the trial court made the following statements:

> [T]he Court does not believe that [appellants have] established by a preponderance of the evidence that [appellees] violated the lease agreement. In particular, the Court does not find specific testimony with respect to the repairs that [appellants] claimed needed to have been done that would establish that the premises were not left in the order that the lease agreement called for. There's no evidence where, for example, that [appellants] attempted in any way to enter the premises and make those repairs that they're contending needed to have been repaired and then billed [appellees] for those repairs. There's no proof here that the condition – nothing that I've seen submitted to me in terms of the exhibits anyway – of the premises as kept by [appellees] violated the leasehold agreement. The Court therefore finds against [appellants] on their complaint. The Court also finds for [appellees] on their counterclaim in the amount of $11,355.00 for the value of the equipment . . . that [appellees] replaced. . . .

On December 6, 2005, the trial court entered judgment for appellees, making the following findings:

> 3. During the term of the lease, the corporation replaced certain equipment ("the equipment") at the restaurant, which equipment it was entitled to remove from the leased premises upon the expiration of the lease.
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> . . . .
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> 5. When the lease expired agents of the corporation sought to remove from the leased premises the equipment which they were lawfully and rightfully entitled to remove, but Loyd unlawfully and improperly prevented it from doing so and Loyd converted to Loyd's own use and possession the equipment, which rightfully belonged to the corporation.
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> 6. The value of the equipment on August 16, 2003, was $11,355.
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> 7. Neither Kameli nor the corporation were in breach of the lease when the lease expired.
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> . . . .
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> 10. Kameli is entitled to simple annual interest at the rate of 6% for the value of the equipment of which Kameli has been unlawfully and improperly deprived on account of Loyd's conversion for the two years and 97 days between August 16, 2003, and the date of trial in this action, which interest totals $1,543.65.
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> 11. The total amount Loyd owes Kameli for Loyd's unlawful conversion of the equipment and interest for the loss of use of the equipment is $12,898.65 through November 21, 2005.
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> 12. At trial, the parties stipulated that Loyd's Complaint should be amended to seek a declaration of the Court that Loyd is entitled to keep the $11,355 insurance proceeds which Loyd received on account of the fire and which was intended to compensate Loyd for the value of the equipment lost in the fire. Loyd has not shown by a preponderance of the evidence that Loyd is entitled to such a declaration.

13. At trial the parties stipulated that Kameli's Counterclaim should be amended to seek damages against Loyd for breach of the lease. Kameli has not shown by a preponderance of the evidence that Loyd so breached the lease.

The trial court awarded appellees judgment in the amount of $12,898 for the insurance proceeds and interest and dismissed all of appellants' claims, and all of appellees' other claims. Appellants filed a timely appeal.

On appeal from a bench trial, we will reverse the circuit court's findings of fact only if they are clearly erroneous or clearly against the preponderance of the evidence. *Smith v. Eisen*, __ Ark. App. __, __ S.W.3d __ (Dec. 13, 2006). We give due deference to the trial court's superior position to determine the credibility of the witnesses and the weight to be given their testimony. *Id*.

Appellants argue that the trial court erred in awarding judgment to appellees for the value of the equipment that appellees replaced during the lease because: (1) the lease did not expressly give appellees the right to remove equipment that they purchased after it was affixed to the building; and (2) pursuant to the express terms of the lease, appellees could not remove their equipment at the end of the lease if they were in default, and appellees were in default by not making the repairs that Mr. Loyd demanded in his January 2003 letter. The following paragraph of the lease is relevant to both arguments:

> LESSORS agree that, provided LESSEE is not in default under this lease, LESSEE may remove from the leased premises upon the termination of this lease all of its partitions, soft floor coverings, signs, shelving, wall cases, and other trade fixtures, fixtures and equipment without let or hindrance by LESSORS, but LESSEE shall repair any damage to the premises resulting from such removal.

The first rule of interpretation of a contract is to give the language employed the meaning that the parties intended, and the court must consider the sense and meaning of the words used by the parties as they are taken and understood in their plain, ordinary meaning. *Cranfill v. Union Planters Bank, N.A.*, 86 Ark. App. 1, 158 S.W.3d 703 (2004). It is the duty of the court to construe a contract according to its unambiguous language without enlarging or extending its terms. *Id*. In regard to the construction of terms of an agreement, the initial determination of the existence of an ambiguity rests with the court. *Id*. When a contract is unambiguous, its construction is a question of law for the court. *Id.* A contract is unambiguous and its construction and legal effect are questions of law when its terms are not susceptible to more than one equally reasonable construction. *Id*. It is well settled that the polestar of contractual construction is to determine and enforce the intent of the parties. *Taylor v. Hinkle*, 360 Ark. 121, 200 S.W.3d 387 (2004). In ascertaining this intention, the court should place itself in the same situation as the parties who made the contract in order to view the circumstances as the parties viewed them at the time the contract was made. *Id*. The intention of the parties is to be gathered not from particular words and phrases, but from the whole context of the agreement. *Southway Corp. v. Metro. Realty & Dev. Co., LLC*, 90 Ark. App. 51, 206 S.W.3d 250 (2005). The interpretation of a contract must be upon the entire instrument and not merely on disjointed or particular parts of it. *Id*. Different clauses of a contract must be read together and the contract construed so that all of its parts harmonize, if that is at all possible. *Fryer v. Boyett*, 64 Ark. App. 7, 978 S.W.2d 304 (1998).

Although appellees were required by the lease to *repair* equipment, it did not require them to *replace* equipment that was beyond repair and it unambiguously gave appellees the right to remove the equipment that they purchased, even if it was affixed to the premises. The lease specifically included the term "fixtures" in the list of items appellees could remove, and the phrase "but LESSEE shall repair any damage to the premises resulting from such removal" clearly contemplated that some of the equipment might be affixed to the structure. Mr. Kameli indicated in his testimony that the items he replaced were beyond repair.

Turning to appellants' next argument, they assert that, because the lease clearly required appellees to make repairs to the property, and because Mr. Kameli acknowledged that he had received Mr. Loyd's January 2003 demand to make certain repairs and that he had not made them, appellees were in default and, therefore, not entitled to remove their equipment. We disagree. The controlling question on this issue is not, as appellants argue, whether the trial court erred in its interpretation of the contract's provision regarding repairs, but whether its finding of fact that appellees were not in breach is clearly erroneous. Whether appellees breached the contract was a question of fact. *Worch v. Kelly*, 276 Ark. 262, 633 S.W.2d 697 (1982). The fact that Mr. Kameli admitted that he had not made the repairs did not require the trial court to believe Mr. Loyd's testimony that appellees were required to make them. It was appellants' burden to establish the need for those repairs and what they would cost, and the trial court explained that they had failed to satisfy that burden.

Disputed facts and determinations of the credibility of witnesses are within the province of the fact-finder. *Farmers Home Mut. Fire Ins. Co. v. Bank of Pocahontas*, 355 Ark. 19, 129 S.W.3d 832 (2003). The fact-finder is free to believe or disbelieve the testimony of any witness, even if it is uncontradicted or unimpeached. *See Farm Bureau Mut. Ins. Co. of Ark., Inc. v. Foote*, 341 Ark. 105, 14 S.W.3d 512 (2000). It is axiomatic that the testimony of an interested party is never considered uncontroverted but is instead considered to be disputed as a matter of law. *Ester v. Nat'l Home Ctrs., Inc.*, 335 Ark. 356, 981 S. W.2d 91 (1998). We cannot, therefore, say that the trial court's finding that appellees were not in breach of contract is clearly erroneous.

Affirmed.

GLADWIN and GRIFFEN, JJ., agree.